

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2024

To be argued by
KEVIN J. MCKAY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. PERRY FORD,
Petitioner-Appellee,
-against-
JACK R. CZARNETZKY, Superintendent,
Eastern New York Correctional Facility,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

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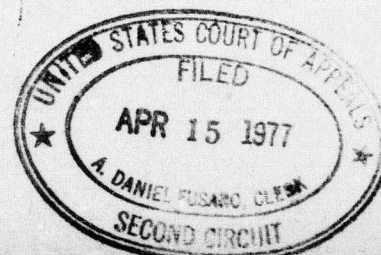


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DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

Preliminary Statement

Respondent-appellant appeals from an order of the United States District Court for the Southern District of New York (Werker, J.), dated January 27, 1977 granting, after an evidentiary hearing, petitioner-appellee's application for a writ of habeas corpus. The District Court vacated the pleas

and sentences and directed that unless the petitioner was retried within 120 days, the indictment is to be dismissed.

Questions Presented

1. Whether the determination of the District Court that petitioner was not informed of the minimum and maximum terms of imprisonment for manslaughter in the first degree and robbery in the first degree was erroneous?

2. If petitioner was unaware of the sentencing consequences of his pleas, whether the knowledge of the minimum and maximum terms would have affected his decision to plead guilty?

Facts and Prior Proceedings

Petitioner is presently confined in the Eastern New York Correctional Facility pursuant to a judgment of conviction rendered by the Supreme Court, Bronx County (Bloustein, J.) on February 11, 1970, after pleas of guilty to the crimes of manslaughter in the first degree and robbery in the first degree. Petitioner was sentenced to an indeterminate term of zero to twenty years on each conviction, sentences to run concurrently.

The Appellate Division, First Department unanimously affirmed the convictions on February 15, 1973. Leave to appeal to the Court of Appeals was denied on April 9, 1973. Petitioner's motion to vacate the convictions pursuant to § 440.10 of the New York Criminal Procedure Law on the grounds that he was not informed of the maximum possible sentence before his pleas was denied on February 10, 1976. Permission to appeal that order was denied on March 23, 1976 by the Appellate Division.

Petitioner then filed an application for a writ of habeas corpus on the grounds that his guilty pleas were involuntary and unknowing because neither the trial court nor his defense counsel informed him of the possible minimum and maximum terms which could be imposed as a consequence of his pleas.

The Crimes

On September 25, 1968, petitioner shot Nathan Goodman with a rifle after a brief argument. As a result of the shooting, petitioner was indicted by the Bronx Grand Jury on December 12, 1968 for assault in the first degree and related crimes.

On December 14, 1968, petitioner and his companions hurled Nicholas Chambers to his death from the roof of the building where petitioner was living.* On December 17, 1968, Ford shot and killed Ronald Quintana. Finally, on December 21, 1968, petitioner's rampage of violence concluded with petitioner and his cohorts trapping William Van Hook in his apartment, firing a bullet close to his head and then robbing Van Hook of his furniture, television set and record player.

On January 14, 1969, the Grand Jury handed down three separate indictments charging petitioner with the murder of Nicholas Chambers, the murder of Ronald Quintana and seven counts of robbery, grand larceny, reckless endangerment and unlawful imprisonment of William Van Hook.

The Pleas

On September 11, 1969, Ford proceeded to trial before Justice Bloustein and a jury on the indictment charging him with the murder of Ronald Quintana. However, on September 17, 1969, at the conclusion of the bulk of the State's case, petitioner was permitted, after extensive consultation with his attorney and mother, to withdraw his earlier plea of not

* Petitioner was severed from the trial of his two co-defendants for the murder of Nicholas Chambers. Both defendants were convicted of murder and sentenced to 15 years to life. At the trial, Linda West who petitioner claims is the mother of his baby testified that Ford was the "prime mover" in the murder of Chambers. (A. 13).

guilty and to plead guilty to manslaughter in the first degree to cover the murder indictment of Quintana. Ford also pleaded guilty to robbery in the first degree to cover all the other outstanding indictments. Thus, petitioner's pleas of guilty to manslaughter and robbery in the first degrees satisfied the indictments for two murders, assault in the first degree and seven counts of robbery, grand larceny, reckless endangerment and unlawful imprisonment.

At the plea hearing on September 17, 1969, Mr. Noah Braunstein, petitioner's trial attorney, informed Judge Bloustein that Ford wanted to withdraw his not guilty pleas and plead guilty to manslaughter and robbery in the first degrees. Mr. Braunstein stated that he was not making this application in order to expedite matters, but "in the interests of justice and in the interests of law and order and in the interest of the defendant. . ." (A. 23).

Mr. Braunstein informed the Court that he was making the application to enter the pleas of guilty after extensive discussions with Ford and his mother and in light of the serious charges pending against Ford. Mr. Braunstein went on to request that the sentences imposed run concurrently, but expressly noted that he was not trying to extract any

promises from the Judges or make it a condition of the pleas (A. 23-24).

Assistant District Attorney Goldsmith recommended acceptance of the guilty pleas on the grounds that the petitioner was a young man who might benefit from rehabilitation and should not be sent away for life. Mr. Goldsmith stated that Ford's plea to manslaughter would not force the Court into imposing a mandatory sentence as a murder conviction would have, and the Court would be in a better position to tailor the sentence to petitioner's situation (A 28-29).

Judge Bloustein then proceeded to question the petitioner on the voluntariness of the pleas and to establish the factual basis for the pleas (A. 29-33).

"THE COURT: With respect to Indictment Number 186 of 1969. Is your name Perry Ford?

THE DEFENDANT: Yes, it is.

THE COURT: Did you just hear your lawyer make a statement to this Court that, in your behalf, a plea of guilty is being entered to the crime of manslaughter in the first degree, to cover the entire indictment? Did you hear him say that?

THE DEFENDANT: Yes, I did.

THE COURT: Have you discussed this case with your lawyer?

THE DEFENDANT: Yes.

THE COURT: What's that?

THE DEFENDANT: Yes.

THE COURT: Now, speak up loudly, so the reporter can hear you.

THE DEFENDANT: Yes.

THE COURT: Do you now plead guilty to the crime of manslaughter in the first degree, to cover the entire indictment?

THE DEFENDANT: Yes, I do.

THE COURT: Has anyone threatened you or coerced you into this plea?

THE DEFENDANT: No, sir.

THE COURT: Do you plead guilty to the facts that, on December 17, 1968, you did shoot one Ronald Quintana, who expired and died on December 28th, as a result of the gunshot wound you inflicted upon him? Do you plead guilty to those facts?

THE DEFENDANT: Yes, I do.

THE COURT: Has the District Attorney or your lawyer or the Court, or any one in their behalf, made any commitment to you, or any promise to you, as to what the sentence of this Court will be?

THE DEFENDANT: No, sir.

THE COURT: In view of the recommendation of the District Attorney and the facts as presented to the Court in this case, the Court will accept the plea of guilty on the part of this defendant to the crime of manslaughter in the first degree, under Indictment 186 of 1969.

With respect to Indictment 188 of 1969: Is your name Perry Ford?

THE DEFENDANT: Yes, it is.

THE COURT: Did you just hear your lawyer make a statement to this Court that, in your behalf, a plea of guilty is being entered to the crime of robbery in the first degree, under the first count of that indictment? Did you hear him say that?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed that case with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: The robbery case.

THE DEFENDANT: Yes.

THE COURT: Speak up, now.

THE DEFENDANT: Yes, I have.

THE COURT: Do you now plead guilty to the crime of robbery in the first degree, under the first count of Indictment 188 of 1969, to cover the entire indictment?

THE DEFENDANT: Yes, I do.

THE COURT: Is this plea of guilty being made voluntarily by you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you now plead guilty to the facts that, on December 21, 1968, at premises 2028 Webster Avenue, in the County of Bronx, in the apartment of Koreem VanHook, you did, together with several others, rob him of his personal belongings? Do you plead guilty to those facts? Do you plead guilty to those facts?

(There was a conference between the defendant and his counsel at this point).

The defendant answered and said, 'Yes, I do.'

THE COURT: Has the District Attorney your attorney or the Court, or anyone on their behalf, made any promise to you, or commitment to you, as to what the sentence of the Court will be?

The defendant answered and said, 'No, sir.'

THE COURT: In view of the recommendation of the District Attorney and the facts as presented to the Court, the Court will accept the plea of guilty on the part of this defendant to the crime of robbery in the first degree, under the first count of Indictment No. 188 of 1969, to cover the entire indictment."

The Beasle Hearing and Sentencing

On October 31, 1969, petitioner appeared before Justice Bloustein for sentencing. However, the probation report submitted to the Judge indicated that Ford wanted to withdraw his pleas of guilty and stand trial. When questioned by the Judge, Ford confirmed the report and stated that he wanted to withdraw both pleas and go to trial. Petitioner accused the prosecution of coercive tactics in inducing his pleas. Judge Bloustein thereupon adjourned the matter for a Beasley hearing.*

The trial court accorded petitioner a Beasley hearing on February 9, 1970 for the purpose of determining whether petitioner should be permitted to withdraw his guilty pleas. At the hearing, petitioner admitted that he didn't discuss his pleas with either the District Attorney or the Judge. After hearing petitioner's testimony and arguments by both counsel, the Court denied the motion to withdraw the guilty pleas from the bench in a thorough and well reasoned

* In People v. Beasley, 25 N Y 2d 483 (1969), the Court held that a defendant is entitled to a hearing on whether his guilty plea was knowingly made.

opinion. The concluding paragraphs of the opinion read as follows:

"After a review of all the facts herein, including the minutes of the proceedings when the defendant interrupted his trial to offer pleas to counts in the two indictments which were acceptable to the DA's office and after the present hearing, this Court has concluded that the defendant, when he pleaded guilty as he did, did so intelligently, understandingly, with knowledge of the consequences that would flow therefrom and meaningfully.

"This attempt on his part is an effort to prejudice the People. The District Attorney's office resists defendant's application averring that over ninety percent of the People's case was interposed before the defendant's pleas were taken. To grant defendant's request on this motion would constitute real prejudice to the People and permit a trifling with the Court and the judicial process.

"Under all the circumstances, this defendant has been adequately advised of his rights before he pleaded, ably represented by counsel, and understood what he did. The denial of his request is in no wise a denial of justice nor does such action constitute prejudice to this defendant. This application is denied." (A. 34).

After denying petitioner's motion to withdraw his pleas, Judge Bloustein sentenced Ford to concurrent indeterminate terms of imprisonment not to exceed twenty years on each conviction. Petitioner had to be resentenced on February 11, 1970 when the Court was informed that petitioner was under 21 years of age. In lieu of being sent to the Ossining Correctional Facility, Ford was sent to the Reception Center at Elmira.

The Hearing in the District Court

At the hearing, the petitioner testified that before he entered his pleas, his attorney informed him that he would not receive more than fifteen years for his pleas of guilty to manslaughter and robbery in the first degrees (A. 114-115). As hereinabove mentioned, petitioner received an indeterminate sentence of zero to twenty years.

Petitioner self-servingly testified that his attorney did not provide him with any other sentencing information about his pleas other than that he could expect no more than fifteen years (A. 112, 115). Petitioner asserts that it was not until his conversation with a probation officer after his pleas that he was informed that

the maximum terms for manslaughter and robbery was 25 years (A. 120-121).

However, petitioner's statement regarding his limited knowledge of sentencing information conflicts with the statements of his attorney, Mr. Noah Braunstein. Mr. Braunstein testified that not only did he inform the petitioner that he could expect no more than fifteen years, but also that if he was convicted of murder for which he was being tried, he could receive a sentence of 25 years to life (A. 77-78, 89).

During the hearing, an unusual sequence of events occurred. Braunstein testified that he most probably had a discussion with petitioner before his pleas during which he informed him of the maximum sentences for manslaughter in the first and second degrees (A. 97-98, 101). Braunstein advised petitioner that the maximum on manslaughter in the first degree was 25 years and 15 years for manslaughter in the second degree (A. 101). Mr. Braunstein further testified that petitioner asked him whether he could get up to 25 years for pleading guilty to manslaughter in the first degree (A. 101).

After testifying to the above facts, Mr. Braunstein was excused as a witness and a short recess was called. During the recess, Braunstein was engaged in a conversation with petitioner's present attorney (A. 107). When court reconvened, Mr. Braunstein was recalled to the witness stand at petitioner's request and recanted a crucial part of his testimony. Braunstein now denied discussing the maximum sentence for manslaughter with the petitioner (A. 103-104). However, Braunstein still admitted informing petitioner of the maximum term for murder (A. 105).

Opinion of the District Court

In its opinion dated January 27, 1977, the District Court, Werker, J., granted petitioner's application for a writ of habeas corpus, vacated the pleas and sentences and directed that unless the petitioner is retried within 120 days, the indictment is to be dismissed. Judge Werker held that the petitioner's pleas were not knowingly made because he was not informed of the minimum and maximum term for manslaughter in the first degree or robbery in the first degree. However, Judge Werker also found that the pleas were voluntarily entered and no promises were made to the petitioner as to what sentence he would receive.

ARGUMENT

PETITIONER'S PLEAS OF GUILTY WERE
KNOWINGLY MADE AND INTELLIGENT
CHOICES AMONG THE ALTERNATIVE
COURSES OF ACTION AVAILABLE TO HIM.

In assessing the constitutional validity of guilty pleas in the state courts, this Circuit has established a dual inquiry which must be conducted by the federal courts. The District Court must determine whether the requisite information was given to the defendant and, if not, whether the omitted information would have affected the defendant's decision to plead guilty. Caputo v. Henderson, 541 F. 2d 979 (2d Cir. 1976); Kelleher v. Henderson, 531 F. 2d 78 (2d Cir. 1976).

It is not enough to argue that a guilty plea is constitutionally infirm because the defendant has been provided erroneous or incomplete sentencing information. Petitioner must demonstrate that the correct sentencing information would have had an impact on his decision to

plead guilty. See United States v. Podell, 519 F. 2d 144 (2d Cir.) cert. den., 423 U.S. 926 (1975); Serrano v. United States, 442 F. 2d 923 (2d Cir.), cert. den. 404 U.S. 844 (1971); United States v. Welton, 439 F. 2d 824 (2d Cir.), cert. den. 404 U.S. 859 (1971); Jones v. United States, 440 F. 2d 466 (2d Cir. 1971).

In Jones v. United States, supra, this Court rejected the argument that knowledge of the maximum possible sentence which might be imposed as a consequence of a plea is constitutionally required. The Court mandated the case for an evidentiary hearing to determine:

"whether Jones was aware of the maximum possible sentence at the time of his guilty plea and, if not, whether Jones would not have pleaded guilty if he had been so aware." 440 F. 2d at 468.

Similarly, in Serrano v. United States, supra, the defendant argued that his plea was involuntary because he was unaware of the minimum sentence when he pleaded guilty. In rejecting his claim, this Court stated that "his alleged ignorance of the theoretical minimum penalty of five years imprisonment could not have affected his decision to plead

guilty" since defendant had no reason to expect less than seven years. 442 F. 2d at 925.

In United States v. Welton, supra, defendant was seeking to vacate his guilty plea because he was not informed that by pleading guilty he would be ineligible for parole. The Court remarked that the defendant had to demonstrate not only that he was not informed of his ineligibility for parole, but also "that he would not have pleaded guilty had he known." 439 F. 2d at 826.

In United States v. Podell, supra, where the defendant alleged that he pleaded guilty on the prosecution's assurance that he would not recommend a jail sentence and that he would testify on the defendant's behalf at a disbarment proceeding, the District Court found that the prosecutor had violated the spirit if not the letter of the prosecutor's representation, but that the defendant in deciding to plead guilty had not relied in any significant degree on the government's representations. This Court upheld the findings and reasoning of the District Court.

In Kelleher v. Henderson, supra, where the defendant was not informed of what maximum and minimum sentences could be imposed if he pleaded guilty, this Court stated that there was "no indication at all that appellant would have acted differently if he had been told of the possibility of a 25 year sentence." (531 F. 2d at 82).

The District Court did not apply the above standard to the instant case, but rather proceeded on the erroneous basis that "a failure to advise a defendant of the minimum and maximum term of imprisonment is fatal to the constitutional requirement that a plea be knowingly made" (A. 144). The District Court misapplied the standard used to review the validity of federal guilty pleas to state pleas. Federal pleas must strictly comply with all the provisions of Rule 11 of the Federal Rules of Criminal Procedure, otherwise they will be treated as a nullity. See United States v. Journet, No. 76-1285, Slip. op. 371 (2d Cir. Nov. 1, 1976). The defendant's knowledge of the minimum and maximum terms is a requirement of Rule 11.

However, the Supreme Court in its major interpretation of the requirements of Rule 11 clearly stated that its holding was grounded in the exercise of its supervisory power over the federal courts and not on constitutional grounds. McCarthy v. United States, 394 U.S. 459, 464 (1969). This Circuit has

made clear that Rule 11's absolute requirement that a defendant know the maximum possible sentence before he enters his plea is not constitutionally required. See Jones v. United States, supra; Kelleher v. Henderson, supra, at 81. The District Court has improperly extended the strict requirements of Rule 11 to review the validity of state guilty pleas.

In order for a federal habeas corpus court to overturn a state court conviction, the petitioner must show not merely that a challenged action of the state courts was "undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973); See Donnelly v. DeChristoforo, 416 U.S. 637, 647-48 (1974).

A. Petitioner had sufficient knowledge of the sentencing consequences of his pleas to make an intelligent decision

The District Court erroneously held that petitioner did not know and was not advised by his attorney or the court of the sentencing consequences of his pleas. This conclusion was reached in total disregard to the numerous circumstances which demonstrate that petitioner did, indeed, possess sufficient knowledge of the possible sentences to make an intelligent and knowing decision.

While petitioner claims that he was only informed that he could expect no more than fifteen years for his pleas and was not given any further sentencing information, this statement is at odds with his attorney's remark that petitioner was also informed that if he was convicted of murder he could receive a sentence of 25 years to life.

The recantation by defense counsel is suspicious in that the questions eliciting the disputed testimony were clear and straightforward, eliminating the possibility of a misunderstanding, and his answers to the effect that he had informed petitioner of the maximum terms for manslaughter were definite and certain. However, after a short recess, defense counsel denied that he had discussed the terms for manslaughter with petitioner, but admitted that he did inform petitioner of the possible sentence for murder.

Even if the Court accepts defense counsel's recantation that he did not discuss the maximum sentence for manslaughter with the petitioner, it is clear that petitioner knew at least that he could receive fifteen years for pleading to manslaughter and at least 25 years for being convicted of murder.

It is significant to note that when the petitioner pleaded guilty, he was not unfamiliar with the criminal justice system. Petitioner was arrested for felonious assault and a weapons offense on October 7, 1968. These charges were later dismissed. Petitioner also had a juvenile delinquency record and served approximately eighteen months in a State training school for one of his crimes (A. 39, 135-136). Petitioner was also incarcerated while awaiting trial on the murder charge. It appears extremely unlikely that during these periods of incarceration the petitioner, described by the District Court as a "street-wise youngster", did not become aware of the sentencing consequences for manslaughter and robbery or discussed them with other inmates before and during his trial. The State court expressed its opinion at sentencing that the petitioner was far from being the naive person the defense counsel portrayed him to be (A. 20).

The District Court overlooked the fact that the voluntary and intelligent nature of petitioner's pleas was previously reviewed in a state court Beasley hearing. After the hearing in which the petitioner testified, Judge Bloustein found that the pleas were voluntary, intelligent and with knowledge of the consequences that would result therefrom (A. 34). In a federal habeas corpus proceeding, the factual

determination of a state court after a hearing, is presumed correct and may be rebutted only upon a showing by the petitioner that those findings are "not fairly supported by the record." 28 U.S.C. § 2254(d)(8). See LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45 (2d Cir.), cert. den., 423 U.S. 872 (1975); United States ex rel. John v. Casscles, 489 F. 2d 20, 25 (2d Cir. 1973), cert. den., 416 U.S. 959 (1974). United States ex rel. Williams v. LaVallee, 487 F. 2d 1006, 1010 (2d Cir. 1973), cert. den. 416 U.S. 916 (1974). Moreover, the validity of petitioner's pleas was reviewed and upheld in a state coram nobis proceeding. This Court should give great weight to these state court findings.

In light of the above information, it is more than reasonable to assume that petitioner who was being represented by a highly capable and seasoned attorney (A. 70) and had extensively discussed the several indictments pending against him with his attorney, had sufficient knowledge of the sentencing consequences of his pleas in order to make an intelligent decision.

B. Petitioner's knowledge of the minimum and maximum terms would not have affected his decision to plead guilty

Assuming arguendo that petitioner was unaware of the maximum and minimum terms for manslaughter and robbery, such knowledge would not have changed his mind to plead guilty.

While petitioner knew he had received an excellent deal because he was so advised by his attorney, it takes no great wealth of legal experience to know that a good deal has been offered when by pleading guilty to manslaughter and robbery in the first degrees, four separate indictments for two murders, an assault and robbery and related crimes will be dismissed. Petitioner knew his pleas would dispose of all his outstanding indictments (A. 131).

Petitioner was also aware that he was facing severe sentences on the charges pending against him. His defense counsel told him, "you are a very lucky fellow because you could -- you are facing a lot of time with respect to these other two indictments" (A. 76-77). Petitioner was facing two possible life sentences on the murder indictments and long sentences on the assault and robbery charges. Petitioner's

plea arrangement was so generous that it was accurately described by defense counsel as "like a Christmas present" and "any lawyer with any experience wouldn't be worthy of his salt not to favor that kind of a deal because these were most serious crimes" (A. 94-95). Clearly, the attractive plea deal was the prime motivating factor behind petitioner's decision to plead. It is difficult to imagine how petitioner's decision to plead guilty would have been affected if his attorney told him to expect no more than fifteen years, but that the technical maximum was twenty-five years.

Petitioner and his attorney also had the benefit of witnessing the bulk of the prosecution's strong case against him before deciding to plead guilty. If the prosecution's case was as weak as the petitioner leads this Court to believe, it seems unlikely that petitioner would have entered a plea to a lesser included offense or that defense counsel would have so impressed upon the petitioner the seriousness of the crimes and possible stiff sentences. Moreover, petitioner had already decided to plead guilty before he entered the courtroom on the day of sentencing, so that nothing the court could have said in reference to the sentencing consequences would have changed his mind (A. 128).

The instant case is almost identical to the case of Kelleher v. Henderson, supra, hereinabove mentioned, where the

petitioner claimed that his plea was unconstitutional because he was unaware of the minimum and maximum sentences when he pleaded guilty. The Second Circuit upheld the denial of the writ and agreed that petitioner's knowledge of the maximum sentence would not have affected his decision to plead guilty.

In addition to identical claims, there are other striking similarities between Kelleher and the case at bar. Both Kelleher and petitioner entered their pleas after hearing the evidence against them. Both had been in trouble with the law before their current crimes and both were familiar with the range of sentences they could receive. Kelleher had some knowledge as to what kind of sentence to expect since he had earlier rejected an offer of a sentence of six to eighteen years if he pleaded guilty. Kelleher received a slightly more severe sentence of seven to 21 years. Petitioner knew he could expect a fifteen year sentence if he pleaded guilty and a 25 year sentence if convicted. Petitioner was sentenced to a zero to twenty year term. Petitioner's plea deal was unquestionably more generous than the one given to Kelleher, so that the impact of the knowledge of the maximum term would be less likely to affect petitioner's decision to plead guilty than Kelleher's.

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The District Court summarily attempts to distinguish Kelleher on the basis that the likelihood of conviction in the present case was such that petitioner did not have as strong a belief that a guilty verdict was a certainty as the petitioner in Kelleher did. However, whether the prosecution's case was stronger in Kelleher than the instant case is not pivotal. The important consideration is that the petitioner felt that his chances of being convicted were good enough to make him decide that it would be more beneficial for him to enter a plea and not risk a harsher sentence. Knowledge of the maximum sentence would not have had any significant impact on petitioner's decision. The District Court fails to reach the crucial issue of whether the additional sentencing information would have affected petitioner's decision to plead guilty.

Petitioner's reliance on the decisions in United States ex rel. Hill v. Ternullo, 510 F. 2d 844 (2d Cir. 1975) and United States ex rel. Leeson v. Damon, 496 F. 2d 718 (2d Cir.), cert. den. 419 U.S. 954 (1974) is misplaced. In both cases, the defendant was erroneously informed as to the sentence he could receive. However, in the instant case, no misinformation was given to the petitioner by either his attorney or the Court.

Even if misinformation was given to Ford, this alone would not invalidate his plea. In Caputo v. Henderson, supra, the trial court provided the defendant with misinformation about the sentencing alternatives available to the court. This Court concluded that the erroneous information given to the defendant had no impact on his decision to plead guilty and did not render his plea involuntary.

C. Assuming arguendo that this Court agrees with the District Court's findings, the relief granted by the District Court must be modified

In vacating the petitioner's pleas and sentences, the District Court directed that unless petitioner was retried within 120 days from the date of the decision, the indictment is to be dismissed.

The District Court has given the almost insurmountable task to the Bronx District Attorney's office of retrying an approximately seven year old crime. The difficulty of obtaining witnesses and the likelihood of dimmed memories is evident. Thus, the possibility of retrying the petitioner at this late date would be extremely remote.

This Court should fashion the relief so as to grant the state court the option of requiring that the petitioner be given the sentence he thought he was receiving for manslaughter -- fifteen years, or permit him to withdraw the pleas and stand trial. See Santobello v. New York, 404 U.S. 257, 263 (1971); United States ex rel. Leeson v. Damon, supra; Mosher v. LaVallee, 491 F. 2d 1346 (2d Cir. 1974).

In Santobello v. New York, supra, the prosecutor promised to make no recommendation as to the sentence to induce the defendant to enter a plea. The prosecutor later broke his promise and recommended the maximum sentence which was imposed. The Supreme Court vacated the pleas and remanded the case to the state courts to determine whether the prosecutor's promise should be enforced or the petitioner should be allowed to withdraw his plea.

In view of the fact that petitioner has repeatedly asserted that he was lead to believe that fifteen years was the maximum sentence he could receive and pleaded guilty on this understanding, it would be entirely appropriate for this Court to permit the state court an opportunity to impose such a sentence if the petitioner cannot be retried.

CONCLUSION

THE FINDING OF THE DISTRICT COURT
THAT PETITIONER'S PLEAS WERE
UNCONSTITUTIONAL BECAUSE THEY WERE
ENTERED WITHOUT KNOWLEDGE OF THE
MINIMUM AND MAXIMUM TERMS OF
IMPRISONMENT SHOULD BE REVERSED,
OR IN THE ALTERNATIVE, THE RELIEF
GRANTED BY THE DISTRICT COURT SHOULD
BE MODIFIED.

Dated: New York, New York
April 14, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
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Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellant
herein. On the 15th day of April , 1977, she
served the annexed upon the following named person :

Chester L. Mirsky, Esq.
80 Fifth Avenue, Suite 1502
New York, New York 10011

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by for that purpose.

Magdaline Sweeney

Sworn to before me this
15th day of April , 1977

Kevin J. McKay
Assistant Attorney General
of the State of New York